



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

November 28, 2017

BY ECF AND E-MAIL

The Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: United States v. Omar Amanat
S8 15 Cr. 536 (PGG)

Dear Judge Gardephe:

The Government writes to advise the Court of concerns that at least five emails Omar Amanat (the “defendant”) produced to the Government during this trial, including four that have been admitted, are not authentic and appear to have been previously fabricated by the defendant. The introduction and attempted introduction of fabricated emails at this trial constitutes obstruction of justice and, as it relates to this trial, evidence of the defendant’s obstructive conduct is admissible to prove the defendant’s consciousness of his guilt. However, rather than elongating the trial by proving up the deceptive conduct set forth below that the defendant has perpetrated against this Court and the jury, the Government presently seeks more limited relief that will allow the trial to move forward while cleansing the evidentiary record of manufactured evidence. Specifically, at this time, the Government respectfully requests that the Court (a) preclude the defendant from introducing the May 8, 2009 email chain detailed below; (b) allow the Government to introduce a June 2008 email in which the defendant seeks help in deleting emails from a Yahoo! email account he controlled; and (c) strike Amanat Exhibits 9002, 9010, 9013 and 908 from the record. If this relief is granted, the Government does not intend to affirmatively seek to introduce evidence of fabrication before the jury. However, if the fabricated emails remain in the record, the Government respectfully requests that it be permitted to introduce evidence of the defendant’s obstructive conduct.

At the outset of this submission, the Government wishes to make clear that it does not believe – and does not have any information to suggest – that defense counsel or any individuals working on their behalf had any knowledge of or involvement in the defendant’s alleged efforts to fabricate and knowingly bring false evidence before this Court and jury.

Background***The May 8, 2009 Email – Not in Evidence***

After the jury was excused on Wednesday, November 15, 2017, defense counsel handed the Government a printed document and informed the Government that the defendant planned to offer the document as an Exhibit at trial. (Ex. A hereto). The document purported to be an email chain containing nine individual emails, all dated May 8, 2009. The Government was familiar with the bottom six emails in the chain but not the top three emails, which are pasted here:

Subject: Fwd: Fwd: Re: Important: FINAL execution copies

From: [REDACTED]
 To: omar@amanatcapital.com; [REDACTED]
 Date: Friday, May 8, 2009, 7:32:41 PM EDT

ASA yes I remember the meeting, I treated him to a nice lunch after which he asked for money for kit. I am still waiting for the money back, or at the very least a lunch!

Abu would also remember the day, I will ask him, I believe there were some documents which he may have.

Always remember keep faith no harm to others and always pray for the best!

Lv
 C

 From: Omar Amanat [mailto:omar@amanatcapital.com]
 Sent: Friday, 8 May 2009 5:27 PM EST
 To: [REDACTED]
 Subject: Fwd: Re: Important: FINAL execution copies

[REDACTED] see below, we finalizing and signing the new agreements, I wanted to keep you fully updated on whats going on. Kaleil has been tough to deal with, but I think he will stick to this agreement, so your investment should be well secured. But if there are any problems you can just go ahead directly and sue both Robin and Kaleil. Speaking of which do you remember when Robin came last year, and did he give you any investment prospectus for KIT, or pick up the check for your investment?

 From: Kaleil Isaza Tuzman [mailto:kit@kitcapital.com]
 Sent: Friday, May 8, 2009 5:21 PM EDT
 To: Kamal Tayara; Stephen Maiden; Omar Amanat; Irfan Amanat
 Subject: Important: FINAL execution copies

Also please note that upon execution *all prior agreements executed in December 2008 by and between Kit, Maiden and Omar are hereby* */null and void ab initio/* and of no further force or effect from this date forward and going back from inception.

Kaleil

Kaleil Isaza Tuzman
 KIT Capital Ltd.
 Dubai Media City
 Building #9, Suite 107
 Dubai, UAE
 Cel (global): +1.917.428.7866
 Email: kit@kitcapital.com
www.kitcapital.com

Features of the 5:21 PM email

As soon as the Government reviewed the printed chain, the 5:21 PM email purportedly authored by Isaza Tuzman raised concerns. *First*, while the 5:21 PM email purports to respond to an email sent by Kamal Tayara, the Subject line of the 5:21 PM Email contains no “Re” or “Fwd” notation. (Amato Decl. at ¶3).

From: Kaleil Isaza Tuzman [mailto:kit@kitcapital.com]
 Sent: Friday, May 8, 2009 5:21 PM EDT
 To: Kamal Tayara; Stephen Maiden; Omar Amanat; Irfan Amanat
 Subject: Important: FINAL execution copies

Also please note that upon execution *all prior agreements executed in December 2008 by and between Kit, Maiden and Omar are hereby* */null and void ab initio/* and of no further force or effect from this date forward and going back from inception.

Kaleil

Kaleil Isaza Tuzman
 KIT Capital Ltd.
 Dubai Media City
 Building #9, Suite 107
 Dubai, UAE
 Cel (global): +1.917.428.7866
 Email: kit@kitcapital.com
www.kitcapital.com

Second, while the email has a timestamp of 5:21 PM, the earlier email in the chain authored by Isaza Tuzman has a timestamp of 10:21 PM. While timestamps within an email chain can conflict, this typically occurs when those emails were sent from different timezones. (Amato Decl. at ¶4). Credit card records for Isaza Tuzman confirm that he was in Los Angeles, CA for all of May 8, 2009. (*Id.*)

>
 > On 5/8/09 10:21 PM, "Kaleil D. Isaza Tuzman" <kit@kitcapital.com> wrote:
 >
 > The loan and promissory notes have changed slightly given the
 > final Settlement Agreement language. Will send along final
 > versions. -K
 >

Finally, duplicate subject lines appear in the email authored by Tayara to which the 5:21 PM email purports to respond to, suggesting that Tayara's email (and those earlier in the chain) were cut and pasted into a new email to which the 5:21 PM email was then added. (Amato Decl. at ¶3).

 From: Kamal Tayara [mailto:Kamal@kcpcapital.com]
 Sent: Friday, May 8, 2009 5:05 PM EDT
 To: Kaleil D. Isaza Tuzman; Stephen Maiden; Irfan Amanat;
oamanat@yahoo.com; Omar Amanat
 Subject: Important: FINAL execution copies

> Re: Important: FINAL execution copies Kaleil
 >
 > 1. the final settlement agreement sent by Irfan and myself include a
 > Witness signature..but the pages are misplaced in Irfan's copy and
 > it is in fact the last page where Motei signature is.
 > 2. Please send the revised promissory note and loan agreement with
 > the proper indexing to the settlement agreement and I will discuss
 > with Irfan and make sure we have them signed and re-witnessed
 > 3. MNA agreement with Omar and Irfan has been signed from my side. As
 > tomorrow is a day off in here, Irfan and myself will print,
 > execute and get it witnessed on Sunday first thing.
 >
 >
 > Best
 >
 > Kamal

Efforts to Authenticate the 5:21 PM Email

Confronted with the facial abnormalities of the 5:21 PM email, the Government has investigated its authenticity, including by searching the email accounts of the listed recipients. There is no evidence that any of the listed recipients received the 5:21 PM email. In fact, all evidence is to the contrary.

1. Irfan Amanat. In July 2016, the Government obtained a search warrant on the email account Irfan.Amanat@gmail.com, which is hosted by Gmail. Irfan Amanat's email account contained thousands of relevant emails sent and received between 2008 and 2012. On May 8, 2009 and May 9, 2009 alone, Irfan Amanat exchanged more than two dozen emails with Tuzman, Omar Amanat and/or Stephen Maiden. (Amato Decl. at ¶5-9.) The earlier communications prior to the 5:21 PM email in the May 8, 2009 email chain in question are present in the account, including the chain depicted in Government Exhibit 1589. (Ex. B hereto). **The 5:21 PM email is not in Irfan Amanat's Gmail account. (Id.).**
2. Stephen Maiden. In 2013, Maiden provided two computers to the FBI (the "Maiden Computers"). These computers included the contents of the primary email account Maiden used during the charged crimes (smaiden@maidencap.com). (Amato Decl. at ¶11-15). The Maiden Computers contained thousands of relevant communications Maiden exchanged with Amanat, Tuzman and Irfan Amanat. Apart from the month of March 2009, for which the email files on Maiden's computer appear corrupted and

- incomplete, it does not appear that Maiden regularly deleted emails from his account. In fact, just on May 8, 2009, Maiden received or sent more than a dozen emails to/from Tuzman, Omar Amanat and/or Irfan Amanat, including Government Exhibit 1589. (Ex. B hereto). (*Id.*) **The 5:21 PM email appears nowhere on the Maiden Computers.** The Government has also reviewed all emails sent/received on May 8-9, 2009 in which both Irfan Amanat and Maiden are senders or recipients. In every case *except* the 5:21 PM email, the Government was able to locate that email in both places – in Irfan Amanat’s email account and on the Maiden Computers.
3. Omar Amanat. Also in July 2016, the Government obtained a search warrant on the account Omar@amanatcapital.com, hosted by Yahoo! (Amato Decl. at ¶17-18.) The May 8, 2009 email chain demonstrates that this amanatcapital.com account is the account to which the 5:21 PM would have been sent. It is also the account from which 5:27 PM email (immediately above it in the chain) was in fact sent to the [REDACTED] account. As the Court knows, the results from this search warrant reflected that all emails between 2008 and 2012 had been deleted from the account before the Government obtained the warrant. (*Id.*) An email recovered from Irfan Amanat’s Gmail account reflected that on June 14, 2008, Omar Amanat emailed his brother to request assistance in “delet[ing] all of my emails from the yahoo site but download them onto my laptop” out of “concern[] about them subp[o]ning yahoo.” Government Exhibit 1589 (and other emails in evidence) indicate that Amanat continued to use this Yahoo! account after June 2008. (Ex. H hereto). (*Id.* at ¶9.) Given that there were no emails in the account as of July 2016, the Government believes that the defendant continued to use this account but periodically and purposefully deleted emails from it for the explicit and state purpose of thwarting investigation. **Thus, by the defendant’s own actions, this email account cannot be used to authenticate the 5:21 PM email.** (*Id.*)
 4. Kaleil Isaza Tuzman. On November 20, 2017, the Government obtained a search warrant for content on May 8-9, 2009 in the Kit Capital email account (kit@kitcapital.com) purportedly used by Isaza Tuzman to send the 5:21 PM email. (Amato Decl. at ¶19-22.) This account is hosted by Microsoft. The Government received the results on November 27, 2017. (*Id.*) The records indicate that Isaza Tuzman sent and received numerous emails on May 8-9, 2009, including the emails in Government Exhibit 1589, among others. (*Id.*) Of particular note, all other emails in the May 8, 2009 chain prior to the 5:21 PM email – including the two prior emails authored by Isaza Tuzman – are present in the account. (*Id.*) **The 5:21 PM email is not in Isaza Tuzman’s account.**
 5. Kamal Tayara. The November 20, 2017 warrant to Microsoft also included a request for the content for May 8-9, 2009 for the email account associated with Kamal Tayara (kamal@kcpcapital.com), to which the 5:21 PM email was also purportedly sent. While his account is also hosted by Microsoft, the returns received by the Government on November 27, 2017 indicate that the content is not available for this account because the account is hosted outside the United States. (Amato Decl. at ¶23.)

Amanat Sent the 5:21 PM Chain to [REDACTED]

Search warrant results for a particular email account can only confirm the authenticity of emails sent directly to/from that email account. (Amato Decl. at ¶25-26.) Earlier emails in a chain that were not directly sent to/from the account cannot be authenticated. (*Id.*) The printed chain provided to the Government indicated that the defendant forwarded what appeared to be the 5:21 PM email (and the earlier emails in the chain) to his uncle, [REDACTED] at [REDACTED] an account hosted by AOL, Inc. The printed chain further indicates that [REDACTED] then sent the email chain to Omar Amanat's father, [REDACTED] at [REDACTED] an account hosted by Yahoo!. The Government obtained the results of search warrants for content of these two email accounts for May 7-9, 2009. (*Id.* at ¶3.) The full chain appears in the Yahoo! account only. (*Id.* at ¶25-26.) However, Yahoo! can *only* verify the authenticity of the top email sent by [REDACTED] to Omar Amanat and his uncle. (*Id.*) Yahoo! cannot authenticate the 5:21 PM email. (*Id.*)

The complete absence of evidence that anyone received the 5:21 PM email – and the absence of evidence that Isaza Tuzman sent the 5:21 PM email – leads to one obvious conclusion: It was faked by Omar Amanat. Back on May 8, 2009, the defendant received the prior emails in the chain (ending with the 5:05 PM email from Kamal Tayara to the defendant and others). The defendant then drafted the 5:21 PM email himself out of whole cloth – an email purporting to be from Isaza Tuzman to the defendant and others announcing the end of their market manipulation agreement. In his haste, the defendant made the formatting mistakes chronicled above in addressing the facial abnormalities of the 5:21 PM email. He then forwarded the chain – now including the faked 5:21 PM email – on to his uncle, [REDACTED].

Why did the defendant do this? Emails produced from Irfan Amanat's Gmail account suggest that the defendant may have fabricated the email to deceive his uncle, [REDACTED] who had provided money to KIT digital, at Omar Amanat's request. While Isaza Tuzman understood this money to be part of Omar Amanat's efforts to pay an Enable redemption to Kit digital, the defendant led his uncle to believe the opposite – that his money was invested in Kit Digital, that it was Isaza Tuzman who now owed the Amanats, and that the defendant was prevailing in his settlement negotiations with Isaza Tuzman. The email marked as Government Exhibit 1804 is an example of Omar Amanat, Isaza Tuzman and [REDACTED] disputing the purpose of the funds the uncle provided to Kit Digital. (Ex. C hereto).

By now intending to offer at trial this email chain, including the fabricated 5:21 PM email, the defendant seeks to profit twice from his forgery. This time, he hopes that the introduction of his own faked 5:21 PM email will allow him to argue to the jury that the market manipulation conspiracy ended more than five years before the return of the Indictment in this case. The email is wholly inauthentic and should be excluded.

Amanat Exhibit 9002, 9010, 9013, and 908 – In Evidence (Redacted)

On November 6, 2017, on the second day of Maiden's cross examination, counsel for the defendant handed the Government a stack of email chains marked for identification, including Amanat Exhibits 9002, 9010, 9013, and 908. This was the first time these emails had been produced to the Government. The top email in each of these chains appeared to be sent or received to/from Amanat's father at the [REDACTED] email account.¹ Amanat Exhibits 9002, 9010, 9013, and 908 have since each been introduced in redacted form. Unredacted and redacted copies are attached. (Ex. D hereto). Because the suspicious emails at issue below only purport to be between the defendant and Maiden, the Government can look to only two places to authenticate them: Omar Amanat's account and the Maiden Computers. As the Court knows, the defendant deleted the contents of his account to avoid subpoena. And as will be seen below, none of the suspicious emails can be found on the Maiden Computers.

After receiving the May 8, 2009 5:21 PM email, the Government re-reviewed the emails Amanat introduced from th [REDACTED] Yahoo! account, and discovered the following:

- Amanat Exhibit 9002. Amanat Exhibit 9002 purports to be an email dated December 2, 2008 from Omar Amanat to Maiden at 11:07 PM, titled "Event, BESN etc." In this email, Amanat addresses the \$2 million Maiden Capital loaned to Enable in November 2008. Amanat tells Maiden that because Blue Earth is performing badly, the \$2 million is "to remain at enable as my security deposit." **The 11:07 PM email is not on the Maiden Computers.** This email is also inconsistent with Government Exhibit 2965 in which the defendant emails Irfan Amanat two weeks later, on December 19, 2008, to complain that "Maiden has tried to reach me and is asking for his \$2 mln back." (Ex. E hereto).

¹ Defense counsel proffered to the Government that these emails were downloaded by his paralegal directly from [REDACTED] Yahoo! Account. Having no reason to doubt the authenticity of the emails, the Government did not object on this basis. The suspicious features of the 5:21 PM May 8, 2009 email caused the Government to reconsider the authenticity of Amanat Exhibits 9002, 9010 9013 and 908. The Government then learned that Yahoo! can only verify the authenticity of the top emails received or sent from [REDACTED] Yahoo! account. That is, there is no way to tell if an email below the top level (like the 11:07 PM email) were faked. To again be clear, the Government does not have any reason to believe that defense counsel or any individual working on their behalf knowingly produced or introduced fabricated emails.

From: omar@amanatcapital.com
 To: [REDACTED]
 Date: Wednesday, December 3, 2008, 12:11:20 AM EST

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Below is an email to involving BESN, Can you please discuss with [REDACTED] Will call and explain later

Love
 omi

From: Omar Amanat [<mailto:omar@amanatcapital.com>]
Sent: Tuesday, Dec 2, 2008 11:07 PM EST
To: Stephen Maiden
Subject: Event, BESN etc

Hey man,

Once again it was really nice finally meeting you and Bonnie in nyc, I'm glad you guys came for the event. Helena really enjoyed meeting you and Bonnie and thought she was very sweet (you not as much:) .sorry we didn't have as much time to spend together then, but I was slammed w the guests.

Thanks also for skyping me the tidbit info on twilight---yes it was a complete surprise and its been a surreal experience, if you remember my passion was to make movies that would change the world like Darfur Now and the Visitor. I honestly never thought a movie about Vegan Vampires and Teenage Werewolves would be the one that had the most impact (not all change is positive!). but life is funny that way. (people want fantasy over reality)

speaking of reality, I have to talk to you about the continued BESN debacle. I know you're a small cap expert and still a big believer in the company (despite logic and common sense), but I have to tell you its doesn't look good. on your word and analysis we invested \$9mln into it, infusing \$4.5 mln in hard cash and blocking \$4.5 mln of further cash and right now it looks like its going to zero with no shot at us selling. that is a \$9 million disaster for me and my friends and family. its really hurt my relationship with russ and another close friend and business partner (Jeff Skoll) and torpedoed the tradeup deal. we're willing to take risks, but its the feeling like we were not told the whole truth on BESN that harms them. the surprise board resignation and the weird stock selling and everything about jim cohen doesn't smell right (Russ is convinced you/him are selling the stock on the side). and its been 3 months and cohen still hasn't lived up to his word to send his \$2million. you're taking too big a bet on him. I dont know why you seem unable to cut your losses on this thing.

so to be clear on our/your \$2mln short term "loan", which would have been due back to you as of today, (given that you didnt lend the last tranche until the 17th or 18th,) however as of today BESN has traded below 6.25 for 20 consecutive trading days, which per our august 27th agreement triggers the additional \$2million cash collateral to be retained by me/Enable until the stock recovers. Therefore the funds are to remain at enable as my security deposit until that happens. And You can't call the funds back until it gets back above 6.25 ---and whats more is that i'm upset you pushed me to send 500k from the \$2mil into BESN, It makes no sense bro. I keep saying your gonna regret doing anything w Cohen. Russ thinks you knew or ought to have known he was a felon. I take you at your word you had no idea before pitching me but still seriously, get your shit together man!. You are an institutional investor w smart money behind you in Saxon. do your due diligence. You even got Sohail and Scott to invest too! lost everyone alot of money bc of your shoddy analysis and witting or unwitting facilitation of Cohen's fraud.

Notwithstanding all of the above, the thing is, I still appreciate that you honored the agreement w me to send back the \$2mln which I appreciate, because cohen didn't and others who are not honorable people would not. So I am willing to give you another chance. But I really want you to move on from the BESN quicksand and roll more into Kit. As a result, Ill give you the option to convert your Enable/Blue Earth agreement into a Enable/Kit agreement so that its tied into the ultimate price of kit instead of BESN.

Hope this makes for a win/win. Give my best to Bonnie and speak soon!

Omar Amanat

Amanat
 Exhibit
 9002
 15 Cr. 536 (PGG)

- Amanat Exhibit 9010. Amanat Exhibit 9010 purports to be a June 2, 2011 email chain between Omar Amanat and Maiden that begins with Maiden forwarding to Omar Amanat a redemption request he received from a Maiden Capital investor. The chain purports to include three additional exchanges between Omar Amanat and Maiden, including a lengthy email from Amanat at 6:13 PM. The 6:13 PM email includes an assertion that Maiden had previously assured Omar Amanat that he is "being transparent and disclosing everything" to his investors. The earlier portions of the email chain are present on the Maiden Computers. **The 6:13 PM email is not on the Maiden Computers.**

Subject: Fwd: RE: Fwd: Money Transfer from STEPHEN E MAIDEN

From: omar@amanatcapital.com

To: [REDACTED]

Date: Thursday, June 2, 2011, 7:32:20 PM EDT



These traders are so funny. Just like back in Tradescape they sometimes don't listen to simple things that will help them. Could you please see if there is a spare turret we can get this guy, maybe one left from INFA that Brad didn't take for himself...or a good price on one?

love, omi

From: Omar Amanat [<mailto:omar@amanatcapital.com>]

Sent: Thursday, Jun 2, 2011 6:13 PM EST

To: Stephen Maiden

Subject: Fwd: Money Transfer from STEPHEN E MAIDEN

Dude, why you never listen to me? I told you DO NOT do the call without recording it!!! What happened to our agreement that you will routinely record all of your calls w LP's from hereon out as a matter of standard practice --- just because they are your friends doesn't mean they wont sue you later so I want to know exactly what is being said :

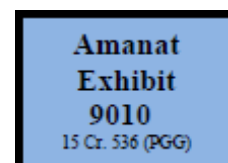
-You have again and again re-assured me per our loan agreement that you are being transparent and disclosing everything about Kit Concentration and litigation risk as well as Enable's lock-up until a Kit sale to your LP's but if you don't record your calls w them how do I know for sure exactly what you are telling them--

-Every trader I know on wall street records their phone calls-- This is standard protocol. How do you not have a basic trading turret? I've never even heard of such a thing in my 15 years of investing in over 40 hedge funds and managing thousands of traders on my trading platforms. Its odd that you "dont know how to record" My 10 year old knows how to press record. Ill ask my team to find one for you or just use camcorder.

-Per our agreement and Usman's review of the legal docs we are redeeming all of your LP's partly in cash and the balance "in kind" per your fund agreements in order to conserve liquidity and be fair to all your LP's.

-Finally, (if you do have the call over my objections) please make sure David Hart knows what I have written above. Explain that the kit sale fee alone is worth more than the value of your fund and once we prepare the suit and share it w Kit's lawyers they will tell Kaleil he needs to settle after reviewing everything. He really has zero choice. You just have to be more aggressive and not meak.

and call me after



- Amanat Exhibit 9013. Amanat Exhibit 9013 purports to be a March 26, 2012 email chain between Omar Amanat, Isaza Tuzman and Maiden. The email consists of 4 emails received/sent to/from Amanat, Isaza Tuzman and Maiden, followed by a purported email at 11:34 AM from only Amanat to Maiden. In the 11:34 AM email, Amanat repeatedly asserts that Isaza Tuzman is “bluffing” about the seriousness of getting the Enable audit confirmation and attempts to downplay the urgency of the situation. The 4 earlier emails in the chain are on the Maiden Computers. **The 11:34 AM email is not on the Maiden Computers.**

Subject: Fwd: Re: 2009 settlement agreement

From: omar@amanatcapital.com

To: [REDACTED]

Date: Monday, March 26, 2012, 11:56:52 AM EDT

**Amanat
Exhibit
9013
15 Cr. 536 (PGG)**

[REDACTED] I need some advice on the below situation.

Maiden is asking me to wire \$2mln out of Enable to meet Kit liability. I don't know if he is bluffing or not? I cannot wire anything without your permission. pls advise. I will call you. I think its not needed bc its a bluff by kaleil (see below) and I dont want to make the same mistakes that last time made our liquidity tight so seek your guidance before doing anything. Enable still has \$20mln in Fyshe.

-----Original Message-----

From: Omar Amanat [mailto:omar@amanatcapital.com]

Sent: Monday, Mar 26, 2012 11:34 AM EST

To: Stephen Maiden

Subject: 2009 settlement agreement

Man, He is playing you like a fiddle again. Haven't we seen this movie before. its just another bluff by K to try to appear "desperate" to get us to wire him \$2mln and not pay us the \$19-20mln we are owed. We did this before, remember? We wired \$2.5mln in Nov and Dec 2008 (including the \$2mln you owed me for BESN) And later he claimed it was for something else; not for buying new Kit Media shares. This is a Total Misdirection.

Get your head on straight and realize the bigger picture and the entire perspective:

1) We have a valid binding settlement worth at least \$19-20mln . Heck the sale fee alone is worth \$20mln and;
 2) Kaleil is sitting on a MOUNTAIN of cash in Kit Media (w cash and shares worth \$50-60mln) on top of another \$100mln in Kit Digital. the company is worth \$500-750mln and may be sold for as much as \$1bln.
 – Do you really think the \$2mln will really affect the company in any way whatsoever. It is enormous in size now. this issue an ant on a molehill and cant possibly affect Kit Digital in any material way..
 3) Therefore my sincere advice to you (which you never listen to) is that he is bluffing that Enable is an issue that has ANY impact on the company..He is just trying to sucker us in to wire funds--and I think he will try to deflect blame for what I heard is an internal coup d'etat by management (Gavin, Robyn and Barak) against him.
 You always buy into his bluff. I heard from a pe guy that Kit is about to sell for \$750mln, and you really think a \$2mln issue will take him down. It makes absolutely zero sense. And neither do you.

Ill play along bc I always leave room for the possibility that I am wrong but use your common sense. this makes no sense. Its just another bluff. Remember when you tried pulling this act and then became the boy who cried wolf? This is Kaleil now.

The Government has identified an email Maiden from the Maiden Computers sent to the defendant shortly after the alleged 11:34 AM email, at 12:50 PM, in which Maiden says: “wtf – call me dude – no more time at all.” (Ex. F hereto). This email is wholly inconsistent with the dubious 11:34 AM email. Unlike the 11:34 AM email, the 12:50 PM email is consistent with text messages, set out in GX 1785-BN, which the defendant and Maiden exchanged the same day. (Ex. G hereto). These text messages demonstrate that both Maiden and the defendant shared Isaza Tuzman’s urgency and concern regarding the request from Kit Digital auditors for the Enable confirmation. At no point in this text exchange does Amanat assert that Isaza Tuzman is bluffing. Instead, the defendant repeatedly acknowledges Maiden’s concerns and states that he is working to find a solution, including in his messages at 10:37:51 PM, 1:34:34 PM and 1:44:43 PM, excerpted here:

<u>Date</u>	<u>Time (EST/EDT)</u>	<u>From</u>	<u>To</u>	<u>Text Message</u>
3/26/2012	8:05:29 AM	Stephen Maiden	Omar Amanat	Are u working w k on this?
3/26/2012	8:53:07 AM	Stephen Maiden	Omar Amanat	Call me
3/26/2012	9:26:33 AM	Stephen Maiden	Omar Amanat	Where r u?
3/26/2012	9:35:51 AM	Stephen Maiden	Omar Amanat	??
3/26/2012	9:54:11 AM	Stephen Maiden	Omar Amanat	Dude wtf!
3/26/2012	10:07:50 AM	Stephen Maiden	Omar Amanat	Where are you???
3/26/2012	10:15:58 AM	Stephen Maiden	Omar Amanat	????????
3/26/2012	10:32:59 AM	Stephen Maiden	Omar Amanat	Wake up!
3/26/2012	10:37:51 AM	Omar Amanat	Stephen Maiden	Am working on it
3/26/2012	10:38:17 AM	Stephen Maiden	Omar Amanat	Email Kaleil now that u are so he can hold off
3/26/2012	11:38:53 AM	Stephen Maiden	Omar Amanat	How is it coming
3/26/2012	12:46:31 PM	Stephen Maiden	Omar Amanat	What's the latest
3/26/2012	12:49:22 PM	Stephen Maiden	Omar Amanat	No word from omar Point of no return is here We must get confirmation of collateral, And needs to be bullet-proof
3/26/2012	12:49:33 PM	Stephen Maiden	Omar Amanat	From k
3/26/2012	12:49:45 PM	Stephen Maiden	Omar Amanat	You have to deliver dude!
3/26/2012	12:54:03 PM	Stephen Maiden	Omar Amanat	???? He is freakin out
3/26/2012	12:55:39 PM	Omar Amanat	Stephen Maiden	Its very hard bro. The italian company has lots of issues
3/26/2012	12:56:42 PM	Stephen Maiden	Omar Amanat	If it doesn't happen it is all dead. Shall we jump on call w k now?

3/26/2012	1:01:38 PM	Stephen Maiden	Omar Amanat	U need to reach out to k to buy time if that is what is needed. Text him u are working on it. He is on text
3/26/2012	1:25:05 PM	Stephen Maiden	Omar Amanat	Can u not offer to guarantee yourself with same terms as guaranteeing party?
3/26/2012	1:27:35 PM	Stephen Maiden	Omar Amanat	We have original settlement now
3/26/2012	1:29:57 PM	Stephen Maiden	Omar Amanat	We are hanging off a cliff.
3/26/2012	1:34:34 PM	Omar Amanat	Stephen Maiden	I did
3/26/2012	1:34:55 PM	Stephen Maiden	Omar Amanat	Did what?
3/26/2012	1:43:27 PM	Stephen Maiden	Omar Amanat	Talked w k. If cant do Italians only option is for u to guarantee it with assets u have in a real brokerage acct. call me to discuss
3/26/2012	1:44:17 PM	Stephen Maiden	Omar Amanat	Has to happen now/today. They are filing k with or without this tomorrow and k says it will be an unmitigated disaster
3/26/2012	1:44:43 PM	Omar Amanat	Stephen Maiden	Ok working on alternative
3/26/2012	2:21:58 PM	Stephen Maiden	Omar Amanat	What is alternative u are working on
3/26/2012	3:12:43 PM	Stephen Maiden	Omar Amanat	Call me when u are free
3/26/2012	3:50:47 PM	Stephen Maiden	Omar Amanat	?
3/26/2012	3:55:48 PM	Stephen Maiden	Omar Amanat	Can u meet k now to work this
3/26/2012	3:55:57 PM	Stephen Maiden	Omar Amanat	There is no tomorrow
3/26/2012	3:58:47 PM	Stephen Maiden	Omar Amanat	??
3/26/2012	4:55:49 PM	Stephen Maiden	Omar Amanat	Pls call k
3/26/2012	5:04:30 PM	Stephen Maiden	Omar Amanat	Are u in touch w k? He said he would do anything. Take all his shares etc as collateral
3/26/2012	5:12:04 PM	Omar Amanat	Stephen Maiden	Trying my best bro. Brokerage statement

In fact, the defendant's later 5:21:19 PM text to Maiden indicated an acute level of urgency: "If he can't do anything w kit media, we are screwed. Its all over."² Thus, the 11:34 AM email is completely incongruous with all of the authentic evidence from that day.

Argument

A. Consciousness of Guilt

In the event that the Government seeks to prove up efforts by the defendant to bring false documents before the jury, there is more than a sufficient factual predicate from which a jury could infer consciousness of guilt and is accordingly admissible.

i. *Applicable Law*

Evidence of a party's consciousness of guilt may be relevant if reasonable inferences can be drawn from it and if the evidence is probative of guilt." *United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004) (citation omitted). "Such evidence is admissible if the court (1) determines that the evidence is offered for a purpose other than to prove the defendant's bad character or criminal propensity, (2) decides that the evidence is relevant and satisfies Rule 403, and (3) provides an appropriate instruction to the jury as to the limited purposes for which the evidence is introduced, if a limiting instruction is requested." *Id.* The Second Circuit has "upheld the admission of various kinds of evidence on the ground that it demonstrated consciousness of guilt," including evidence of flight, witness intimidation and jury tampering. *United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004) (collecting cases). Such evidence should be accompanied by an instruction that such evidence may only be considered as an indication of a defendant's consciousness of guilt, not evidence of the defendant's guilt of the charged crimes. *United States v. Scheibel*, 870 F.2d 818, 822 (2d Cir. 1989).

Evidence that a defendant fabricated evidence has been admitted to show consciousness of guilt. *United States v. Osorio Estrada*, 751 F.2d 128, 132 (2d Cir. 1984) (upholding a district court's admission of evidence that a passport had been altered by the defendant during trial as consciousness of guilt); *United States v. Rucker*, 586 F.2d 899, 904 (2d Cir.1978) (upholding the introduction of evidence of alibi fabrication showing consciousness of guilt); see *United States v. Culotta*, 413 F.2d 1343, 1346 (2d Cir. 1969) (holding that evidence the defendant planned to "fabricate evidence is admissible against a defendant as tending to show a consciousness of guilt"). Where evidence establishes a factual predicate for fabrication and an inference of consciousness of guilt, "the accepted technique is for the judge to receive the evidence

² The Government also now doubts the authenticity of Amanat Exhibit 908, a March 10, 2009 purported discussion of an Enable audit. The Government has been unable to verify the 11:33 a.m. email from Amanat to Maiden in which Amanat asserts that he previously told Maiden to disclose to his investors the fact that Enable funds are tied up. This email does not appear on the Maiden Computers. Based on law enforcement's review of the Maiden Computers, the emails for March 2009 appear corrupted and/or incomplete and therefore the Maiden Computers cannot be used to confirm or deny the authenticity of this email. Given the pattern of apparent fabrication, the Government respectfully submits that this email should also be stricken from the record unless the defendant is able to offer independent evidence of its authenticity.

and permit the defendant to bring in evidence in denial or explanation.” *United States v. Amuso*, 21 F.3d 1251, 1258 (2d Cir. 1994).

ii. *Discussion*

During this trial, the defendant informed the Government it planned to admit the May 8, 2009 email chain, which included the 5:21 PM email. The Government has since developed significant evidence establishing a clear factual predicate from which the jury could infer that the 5:21 PM email was fabricated by the defendant. The email itself has several suspicious characteristics that suggest it was not actually sent. Most notably, the 5:21 PM email is conspicuously absent from the multiple email accounts and computers that supposedly sent and received the email, including the emails accounts of Isaza Tuzman, Irfan Amanat and the Maiden Computers. The absence of the 5:21 PM email from these sources is even more probative of fabrication because these sources contains numerous other emails, exchanged between the same parties, on the same day, regarding the same topic. In addition to establishing a factual predicate that the 5:21 PM email was fabricated, the email also supports an inference of consciousness of guilt concerning the charged crimes. Specifically, if authentic, the 5:21 PM email would assist the defendant by raising questions about the viability of the December 2008 agreement between the defendant, Isaza Tuzman and Stephen Maiden pursuant to which the Government has alleged the market manipulation conspiracy charged in Count Four of the Indictment.

In *Osorio Estrada*,³ a case in which the Second Circuit upheld a district court’s introduction of evidence that a defendant fabricated dates on his passport as consciousness of guilt, the Court considered both the strength of the evidence linking the defendant to the alleged fabrication and the relevance of the fabricated evidence to the charged crimes. Because the passport was altered while in the custody of the defense and the fabrication consisted of altering travel dates relevant to the charged crimes, the evidence that the passport had been altered supported an inference of consciousness of guilt on the charged crimes. The same analysis applies here. *First*, as outlined above, evidence that the 5:21 PM email was fabricated by the defendant, the only person with access to the Yahoo! account from which the 5:21 PM email was purportedly forwarded is persuasive. *Second*, the defendant’s attempted introduction at this trial of an email claiming to invalidate the central December 2008 agreement that is central to Count Four allows the jury to infer consciousness of guilt on the charged crimes.

Finally, the fact that the defendant appears to have originally sent the 5:21 PM email in 2009 does not alter the analysis. The relevance is not that the defendant fabricated the email in

³ In the presence of the jury, the Government in *Osorio Estrada* also asked defense counsel and the interpreter – the only two other individuals with relevant access to the passport – to deny a role in the alterations. While still affirming the introduction of the evidence to prove the defendant’s consciousness of guilt, the Second Circuit found it was improper for the prosecutor to force defense counsel to deny in the jury’s presence that he or the interpreter had a role in any alterations. In this case, the Government does not intend to seek to question defense counsel or his paralegal about knowledge of any fabrication in the event the Government determines to prove the fabricated nature of the emails to the jury. Nor would the Government suggest or make arguments to the jury that defense counsel had any knowledge or involvement in the alleged fabrication.

May 2009 but that during *this* trial, the defendant took the extraordinary step of attempting to introduce an email he knew to have been fabricated.

B. Striking Amanat Exhibits 9002, 9010, 9013, and 908

As outlined above, the defendant has already introduced, in redacted form, at least four emails which the Government now has significant reason to believe were also fabricated. The Government requests that these exhibits be stricken from the record.

While the Government did not object to authenticity when these documents were offered, the Government was provided with a very limited opportunity to consider them. Specifically, contrary to the parties' agreement that the defendant was required to provide the Government with all non-impeachment exhibits seven days prior to the October 30, 2017 commencement of trial, the Government first received these emails in Court while Mr. Maiden was on cross-examination.⁴ At the time, defense counsel proffered to the Government that his paralegal downloaded these emails directly from [REDACTED] Yahoo! Account. When the Government stated to the Court that it had only 30 minutes to review these documents and was "just kind of scrambling at this point, your Honor, to figure out what issues may come up," defense counsel responded: "Right, as they should be," and stated his belief that all of the emails represented impeachment material and therefore did not have to be disclosed prior to trial. (Tr. 1242).⁵

The Government's motion to strike is both timely and necessary, given that the Government only recently learned that the emails are not authentic and the long-held view that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972); see *United States v. Check*, 582 F.2d 668, 676 (2d Cir. 1978) ("The traditional view is that an objection, or a motion to strike, is untimely only if the objection, or motion to strike, was not made as soon as the ground of it is known, or reasonably should have been known to the objector." (internal quotation marks omitted)). The Court maintains "broad discretion regarding the admission of evidence" and its decision on the Government's motion to strike will be reversed

⁴ Amanat Exhibit 907 was one of the documents handed to the Government during Maiden's cross. Amanat Exhibit 907 is a December 19, 2008 the defendant sent to his father, [REDACTED]. The Government objected to the admission of this document, orally, on hearsay grounds and then filed a letter on November 8, 2017 articulating its position that the state-of-mind exception set forth in Federal Rule of Criminal Procedure 803(3) did not apply. In questioning defense counsel why Amanat Exhibit 907 had not been produced seven days prior to trial as part of the parties agreement, the Court asked Mr. Jackson when Amanat Exhibit 907 was identified. Mr. Jackson responded that the exhibit was identified on October 29, 2017, which was a day before opening statements.

⁵ Having re-reviewed the defense counsel's opening statement, it also appears that the defendant intended to rely on certain documents, knowing they had not yet been provided to the Government. For example, in opening, defense counsel stated: "In fact, you're going to see that Omar had every reason to believe that Maiden was actually telling his investors the truth, and you're going to see that Omar repeatedly reminded Maiden of how important it was to disclose everything to his investors." (Tr. 182). Amanat Exhibit 9010 appears to be the basis for this statement.

“only if [it is] ‘manifestly erroneous[.]’” *United States v. SKW Metals and Alloys Inc.*, 195 F.3d 83, 87 (2d Cir. 1999) (citing *Phoenix Associates III v. Stone*, 60 F.3d 95, 100 (2d Cir. 1995)); *see also United States v. Al Jaber*, 436 Fed.App’x. 9, 13 (2d Cir. 2011) (using abuse of discretion standard to review trial court’s ruling on motion to strike). Here, there is now significant reason to believe there is falsified evidence in the record. The [REDACTED] Yahoo! Account is not a source of verification for emails not received or sent to/from this account, the emails are not on the Maiden Computers, and the Government is aware of no other source that could verify these emails. As with the May 8, 2009 email, it is not plausible that *each* of these facially exculpatory emails does not appear on Maiden’s Computers while the balance of their inculpatory communications are.. The fabrication of the 5:21 PM May 8, 2009 email appears to be part of a larger pattern by the defendant to introduce fabricated evidence before the jury.

C. Requested Relief

While the Government believes it has an ample factual and legal basis to put the defendant's obstructive conduct before the jury, it presently seeks more surgical relief in an effort to keep the trial moving forward and avoid the need to call additional witnesses on this issue. At this time, the Government respectfully requests that the Court (a) preclude the defendant from introducing the May 8, 2009 email chain; (b) allow the Government to introduce the June 2008 email in which the defendant seeks help in deleting emails from a Yahoo! email; and (c) strike Amanat Exhibits 9002, 9010, 9013, and 908 from the record. If this relief is granted, the Government does not intend to introduce evidence to the jury that the May 8, 2009 email (among others) was fabricated as evidence of the defendant's consciousness of guilt.

Respectfully submitted,

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